IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 26, 2007

STATE OF TENNESSEE v. TERRELL LEE DAVIS

Direct Appeal from the Criminal Court for Hamilton County
No. 248289 Jon Kerry Blackwood, Judge

No. E2006-01450-CCA-R3-CD - Filed November 5, 2007

Defendant, Terrell Lee Davis, was indicted for first degree premeditated murder, first degree felony murder, and especially aggravated kidnapping. Following a jury trial, Defendant was found guilty of the lesser included offense of second degree murder, and not guilty of felony murder and especially aggravated kidnapping. Following a sentencing hearing, the trial court sentenced Defendant as a Range I, standard offender, to twenty-two years. On appeal, Defendant argues that (1) the trial court erred in its jury instructions; (2) the trial court erred in limiting Defendant's cross-examination of State witnesses Eva Evans and Dr. Stanton Kessler; and (3) the trial court erred in denying Defendant's motion to suppress his statement to the police. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Brian S. Finlay, Chattanooga, Tennessee, (on appeal); Ardena J. Garth, District Public Defender; and Hilary Stuart, Assistant Public Defender, and Myrlene Marsa, Chattanooga, Tennessee, (at trial), for the appellant, Terrell Lee Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; and Neal Pinkston, Assistant District Attorney, for the appellee, the State of Tennessee.

OPINION

I. Background

Although Defendant does not challenge the sufficiency of the convicting evidence on appeal, we will briefly review the evidence supporting Defendant's conviction of second degree murder. Richard Puckett testified that he had a party at his house on January 21, 2004, which was attended

by Defendant, Eva Evans, Andy Forsythe, and the victim, Frederick Williams. The group was drinking, and Mr. Puckett said that the victim was drunk by the end of the evening. Defendant left the party around 1:00 a.m. to drive the victim home. Mr. Puckett borrowed some money from the victim that night, and the victim took Mr. Puckett's weed eater and a wooden plane as security when he left.

Mr. Puckett said that Defendant telephoned about thirty or forty-five minutes later and talked to Ms. Evans. Mr. Puckett talked to the victim's wife the next day and learned that the victim had not come home that night. Defendant called Mr. Puckett the next day, and Mr. Puckett asked him what had happened to the victim. Defendant responded, "You know me better than that."

Eva Evans verified that the victim was intoxicated by the end of the party. Ms. Evans also said that the group, except for the victim, was smoking "a little bit" of crack cocaine. Ms. Evans said that she had ended her relationship with Defendant prior to the incident because Defendant was overly possessive. Ms. Evans acknowledged that on a prior occasion Defendant had confronted her after she had a sexual encounter with the victim.

Ms. Evans said that the victim did not drive, and Defendant offered to drive the victim home. Ms. Evans told the victim to call her when he arrived home, but she did not hear from him. Defendant called about an hour after he left Mr. Puckett's home with the victim. Ms. Evans told Defendant she had not heard from the victim, and Defendant responded, "Trust me, I took him home." Ms. Evans said Defendant was calm during the conversation. Ms. Evans said that Defendant always kept a knife in his car, tucked in between the driver's seat cushion and the torn upholstery.

The victim's body was discovered on January 22, 2004, in an illegal dump site. A couch had been placed on top of the victim's body. Officer Tracy McGhee, with the Chattanooga Police Department, testified that the victim had what appeared to be stab wounds to his chest, and a large amount of blood covered the victim's groin area. The victim's pockets were pulled inside out.

Officer McGhee said that Defendant was developed as a suspect during the course of the investigation, and he located Defendant at a trailer owned by Denise Morgan on January 24, 2004. Officer McGhee told Defendant that the investigating officers wanted to talk to him about the victim's death, and Defendant was escorted to the police station. When he arrived, Defendant was read his *Miranda* rights, and he executed a written waiver of those rights. Defendant executed a consent to collect physical evidence from him, including hair and blood samples, and consented to the search of his vehicle. Officer McGhee said that Defendant did not request the presence of an attorney during the interview process and did not appear to be under the influence of drugs or alcohol. Officer McGhee said that Defendant was cooperative and willing to talk to the investigating officers about the incident.

Detective Mike Tilley with the Chattanooga Police Department was present during Defendant's recorded statement. Detective Tilley said that Defendant was very talkative and never

requested an attorney or indicated that he did not understand the proceedings. The taped recording of Defendant's statement was played to the jury.

In his statement, Defendant said that the victim grabbed his wrist while Defendant was driving, and Defendant stabbed the victim. After the stabbing, Defendant asked the victim if he wanted to go to the hospital, but the victim said, "No." Defendant said the victim died shortly thereafter. Defendant took the victim's body to the illegal dump site because the victim did not want to go to the hospital. Defendant took ten dollars from the victim in order to make the stabbing appear to have been done during a robbery. Defendant threw the knife and the clothes he was wearing into a dumpster, and he attempted to remove all of the blood stained carpet and upholstery from his Datsun vehicle.

Officer McGhee stated that Defendant's white Datsun was towed to the police department's evidence processing bay. The carpet and padding from the passenger side floorboard, the carpet on the front and rear driver's side, and the driver's side seat cover had been removed. These items were found in a black garbage bag in the driver's seat. Agent Margaret Bash, with the T.B.I.'s serology DNA unit, testified that the blood samples taken from various areas of the Datsun matched the victim's blood sample.

Dr. Stanton Kessler testified that he was the assistant medical examiner for Hamilton County at the time of the incident and performed an autopsy on the victim. Dr. Kessler stated that the victim had been stabbed once in the chest at the top of the abdomen, and once on the right side of the body. The stab wound to the chest pierced the victim's lungs, inner chest wall, and the right side of his heart. Dr. Kessler said that this wound was fatal and was the cause of the victim's death. Dr. Kessler said that the victim probably died between one and four minutes after the infliction of the wound. The collection of blood in the victim's groin area was consistent with the victim being stabbed while seated and then slumping forward. Dr. Kessler said that the victim did not have any defense wounds on his hands. Dr. Kessler stated that the position of the victim's wounds indicated that the victim had turned and was facing the driver when he was stabbed.

II. Motion to Suppress

Defendant argues that the trial court erred in not suppressing his statement to the police. Defendant submits that his use of drugs in the days preceding the interview and his lack of sleep on the day of the interview rendered his statement involuntary.

At the suppression hearing, Detective Ralph Kenneth Freeman with the Chattanooga Police Department testified that Defendant was developed as a suspect after it was determined that he had left the party with the victim on the night of the killing. Detective Freeman said that Defendant was brought to the police station on January 24, 2004, and provided his *Miranda* rights. Detective Freeman asked Defendant to read the waiver form and initial each paragraph to indicate his understanding of the paragraphs' contents, which Defendant did. Defendant acknowledged that he could read and write, and he did not request the presence of an attorney. The waiver form was

signed at 3:25 p.m. Detective Freeman stated that Defendant did not appear to be under the influence of drugs or alcohol during the interview.

Detective Freeman said he did not begin recording Defendant's statement immediately because the investigating officers were processing Defendant's Datsun that afternoon. Defendant executed a consent form to search his vehicle at 4:03 p.m.

Detective Freeman said that Detective Tilley joined them at some point, and Defendant's recorded statement began at 10:36 p.m. According to Detective Freeman, Defendant rambled a good bit during his statement, and for approximately an hour and a half spoke only generally about his life and things that had happened to him. The last thirty minutes of the interview focused on the crime with Defendant admitting that he had stabbed the victim and placed the body in an illegal dump site. Detective Freeman said that Defendant never requested the presence of an attorney while he was at the police station.

On cross-examination, Detective Freeman acknowledged that he did not recollect if he specifically asked Defendant if he had ingested any drugs that day. Detective Freeman stated that Defendant did not appear confused during his statement. Defendant wanted to tell the story his own way and told Detectives Freeman and Tilley not to interrupt him.

Sergeant Edwin McPhearson, with the Chattanooga Police Department, was present when Defendant executed a written waiver of his *Miranda* rights and stayed with Defendant that afternoon while the detectives were out of the room. Sergeant McPhearson said that during the afternoon Defendant did not ask any questions or request an attorney. Defendant was taken to the bathroom a couple of times, and Sergeant McPhearson bought him a soda. Sergeant McPhearson said that Defendant watched television and could have taken a nap if had chosen to do so.

Detective Tilley said that he arrived at the police station between 6:30 and 7:00 p.m. Detective Tilley had a conversation with Defendant and then bought Defendant a hamburger and some french fries from a fast food restaurant across the street. Detective Tilley said that Defendant did not appear to be under the influence of drugs or alcohol and did not request the services of an attorney.

On cross-examination, Detective Tilley acknowledged that it was sometimes hard to follow Defendant's train of thought during the interview. Detective Tilley interviewed Denise Morgan before Defendant's statement. Ms. Morgan said that Defendant had been staying with her periodically and had arrived again at her trailer during the morning of January 22, 2004. Detective Tilley said that Ms. Morgan told him that she and Defendant stayed at Ms. Morgan's trailer that day, drinking and smoking crack cocaine. Detective Tilley said that Ms. Morgan was calm during her interview and did not appear to be under the influence of drugs.

The defense called Denise Morgan as a witness. Ms. Morgan confirmed that Defendant arrived at her trailer on the morning of January 22, 2004. Defendant had been staying with her for

approximately one week, and she acknowledged that he had not come home on the evening of January 21, 2004. Ms. Morgan said that she and Defendant had last smoked crack cocaine on January 22, 2004, and Defendant had not ingested any drugs on the day that he gave his statement to the police. Ms. Morgan acknowledged that she and Defendant had not slept in two days.

On cross-examination, Ms. Morgan said that she and Defendant did not smoke crack cocaine on a daily basis. Ms. Morgan testified that she and Defendant went to the pawn shop on January 23, 2004, and pawned the weed eater that the victim had taken from Mr. Puckett. Ms. Morgan stated that Defendant was working on a neighbor's motorcycle when the police arrived on January 24, 2004.

Michael Gibbs testified that Defendant had given him a ride to work at the end of January, but he could not remember the exact date. Mr. Gibbs said that he did not notice any blood in Defendant's automobile, and he did not see Defendant ingest drugs on the day that the ride was provided.

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence contained in the record preponderates against them. *State v. Ross*, 49 S.W.3d 833, 839 (Tenn. 2001). The trial court, as the trier of fact, is able to assess the credibility of the witnesses, determine the weight and value to be afforded the evidence and resolve any conflicts in the evidence. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001). However, this Court is not bound by the trial court's conclusions of law. *State v. Simpson*, 968 S.W.2d 776, 779 (Tenn. 1998). The application of the law to the facts found by the trial court are questions of law that this court reviews *de novo*. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). The defendant has the burden of establishing that the evidence contained in the record preponderates against the findings of fact made by the trial court. *Braziel v. State*, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975).

In *Miranda v. Arizona*, 384 U.S. 436, 471-75, 86 S.Ct. 1602, 1626-28, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that a defendant's statements made during a custodial interrogation are inadmissible at trial unless the State establishes that the defendant was informed of his right to remain silent and his right to counsel and that he knowingly and voluntarily waived those rights. Whether the defendant made a voluntary, knowing, and intelligent waiver of those rights depends "'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884, 68 L. Ed. 2d 378 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)). The waiver must be "'made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Blackstock*, 19 S.W.3d 200, 208 (Tenn. 2000) (quoting *State v. Stephenson*, 878 S.W.2d 530, 544-45 (Tenn. 1994)). The State has the burden of proving the waiver by a preponderance of the evidence. *State v. Bush*, 942 S.W.2d 489, 500 (Tenn. 1997).

In determining the admissibility of a confession, the particular circumstances of each case must be examined as a whole. *State v. Berry*, 141 S.W.3d 549, 577 (Tenn. 2004) (Appendix); *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996). A defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional sense. *Berry* 141 S.W.3d at 577. The primary consideration in determining the admissibility of the evidence is whether the confession is an act of free will. *Id*. at 577-78 (citing *State v. Chandler*, 547 S.W.2d 918, 920 (Tenn. 1977)). In determining whether a defendant validly waived his rights, the court must consider several factors in determining voluntariness, including a defendant's intoxication or ill health at the time the confession was made, and a defendant's deprivation of food, sleep or medical attention. *See State v. Huddleston*, 924 S.W.2d 666, 671 (Tenn.1996).

The law in this state is well-established that "[t]he ingestion of drugs and alcohol does not in and of itself render any subsequent confession involuntary." *State v. Morris*, 24 S.W.3d 788, 805 (Tenn. 2000) (quoting *State v. Robinson*, 622 S.W.2d 62, 67 (Tenn. Crim. App. 1980)). "It is only when an accused's faculties are so impaired that the confession cannot be considered the product of a free mind and rational intellect that it should be suppressed." *Robinson*, 622 S.W.2d at 67 (citing *Lowe v. State*, 584 S.W.2d 239 (Tenn. Crim. App. 1979)). The test to be applied in these cases is whether, at the time of the statement, the accused was capable of making a narrative of past events or of stating his own participation in the crime. *Morris*, 24 S.W.3d at 805.

At the conclusion of the suppression hearing, the trial court found that:

> all three officers testified that they didn't, in their observation of [Defendant], that he did not appear to them, at the time they were speaking with him, to be under the influence. They didn't smell anything on his breath, there was nothing to indicate to them that he was not capable of giving this statement. Everybody agrees, the Court included, that this is a rambling statement. What struck me about it . . . was that [Defendant] was very much in control of this interview. When these officers would attempt to speak to him about matters, the crux of the case, he told them pretty much, listen, if you want to hear what I got to say, just be quiet and listen to my version of the event, I'm going to tell you everything. And he did. The position of the defense that [Defendant] was under the influence at the time that he gave his statement is not supported by the evidence that I've heard today. The testimony of Ms. Morgan is that . . . they did not use crack after the 22nd, and that he functioned normally on the 23rd, went to the store, went to the pawn shop, that he was working on a vehicle at the time that the police showed up to arrest him.

The trial court acknowledged that Ms. Morgan had said that she and Defendant had not slept during the two days preceding the giving of Defendant's statement but observed that Ms. Morgan also testified that she and Defendant were not together the whole time. The trial court found that Defendant was given nourishment before his statement was taken, and there was no evidence that he was not in a position to give his statement. The trial court noted that Defendant did not dispute that he did not request the presence of counsel during the interview process and concluded:

> [s]o it gets down to the position that he was deprived of sleep and therefore unable to [give his statement]. I do not find the evidence convincing to me that that would form a basis here to render this statement invalid, so I believe the totality of the circumstances indicate in fact that [Defendant] did give a voluntary statement . . . .

All three officers who were involved in the interview process testified that Defendant did not appear to be under the influence of alcohol or drugs while he was at the police station, and Ms. Morgan testified that Defendant had not ingested drugs before he was arrested. Defendant was working on a motorcycle when the police arrived. He was provided food, sodas, and restroom breaks during the interview. Sergeant McPhearson stated that Defendant spent most of the afternoon watching television and could have taken a nap if he had so wanted. Although admittedly expansive, Defendant was able to provide a detailed narrative of the sequence of events leading up to the killing.

The evidence in the record supports the trial court's findings that Defendant was advised of his *Miranda* rights, that he waived those rights, and that he gave a voluntary statement. Accordingly, under the totality of the circumstances, we hold that Defendant knowingly and voluntarily waived his constitutional right against self-incrimination and voluntarily gave his statement concerning the killing of the victim. The trial court did not err by denying the motion to suppress evidence. Defendant is not entitled to relief on this issue.

III. Evidentiary Rulings

Defendant argues that the trial court erred in limiting his cross-examination of Ms. Evans and Dr. Kessler. Defendant contends that the trial court's evidentiary rulings violated his constitutional right to present a defense.

In examining the relationship between the constitutional rights extended under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, and the evidentiary rules governing relevance and the impeachment of witnesses, this Court has observed,

> that the defendant's constitutional right to confront the witnesses against him includes the right to conduct meaningful cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 998, 94 L. Ed.2d 40 (1987); *State v. Brown*, 29 S.W.3d 427, 431 (Tenn. 2000); *State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn. 1992). Denial of the defendant's right to effective cross-examination is "'constitutional error of the first magnitude'" and may violate the defendant's right to a fair trial. *State v. Hill*, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974)). "The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the sound discretion of the trial court." *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); *Coffee v. State*, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (1948). Furthermore, "a defendant's right to confrontation does not preclude a trial court from imposing limits upon cross-examination which take into

> account such factors as harassment, prejudice, issue confrontation, witness safety, or merely repetitive or marginally relevant interrogation." *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994). This court will not disturb the limits that a trial court has placed upon cross-examination unless the court has unreasonably restricted the right. *Dishman*, 915 S.W.2d at 463; *State v. Fowler*, 213 Tenn. 239, 253, 373 S.W.2d 460, 466 (1963).
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> We also recognize that the "Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense." *Brown*, 29 S.W.3d at 432; *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed.2d 297 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.") Although this right is critical, at times it "'must yield to other legitimate interests in the criminal trial process,'" including "'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Brown*, 29 S.W.3d at 432 (quoting *Chambers*, 410 U.S. at 295, 302, 93 S.Ct. at 1046, 1049).

State v. Wyrick, 62 S.W.3d 751, 770 (Tenn. Crim. App. 2001).

A. Cross-Examination of Ms. Evans

The State's theory of motive was based on Defendant's jealousy of the victim's prior sexual encounter with Ms. Evans of which Defendant had knowledge. Defendant attempted to rebut this alleged motive by showing that Ms. Evans had numerous sexual encounters with persons other than the victim and even possibly worked as a prostitute at a local motel, all of which was known to Defendant. During Ms. Evans' cross-examination, defense counsel asked Ms. Evans if she was working at the Best Value Motel while she was seeing Defendant, to which Ms. Evans responded, "I don't recall." Ms. Evans acknowledged that she visited friends at the motel, including a man named "Ricky." At this point, the State objected on relevancy grounds.

In a hearing out of the presence of the jury, defense counsel argued that this line of questioning was relevant to rebut the State's theory that Defendant was overly possessive of Ms. Evans. During an offer of proof, Ms. Evans again denied that she had sex at the motel in exchange for drugs or money. She acknowledged, however, that she told Defendant that she did because "the only way you can get away from him, is to tell him you're working and to bring money to him."

At the conclusion of the offer of proof, the trial court ruled that defense counsel could ask Ms. Evans if she had told Defendant that she worked at the motel as a prostitute, and Ms. Evans could testify either negatively or affirmatively. The trial court cautioned, however, that:

> [i]f you ask her has she ever worked at the Best Value and she says no, then that ends it. You may go on further and ask the question did you ever tell [Defendant] that you

> worked at the Best Value. If you go that far, and she says, yes, then the State has the right – and, of course, that's false – then the State has the right to go into why [Ms. Evans] told [Defendant]. And if that why leads into domestic violence, it comes out that way.

Based upon the trial court's ruling, defense counsel did not pursue this line of questioning upon resuming Ms. Evans' cross-examination.

"Generally, the right to present a defense is not denied when a defendant does not pursue a line of questioning during cross-examination." *State v. Flood*, 219 S.W.3d 307, 318 (Tenn. 2007). Defense counsel made a strategic decision to abandon this line of questioning. Ms. Evans admitted in her testimony that she was still married when she started seeing Defendant, and that she had numerous sexual partners during the months preceding the offense. Ms. Evans said that Defendant knew that she wanted to have a sexual relationship with Mr. Puckett. In addition, the exclusion of testimony as to why she might have falsely told Defendant that she worked at the motel as a prostitute did not undermine Defendant's defense that he killed the victim in self-defense. Based on the foregoing, we conclude that Defendant was not deprived of his constitutional right to present a defense. Defendant is not entitled to relief on this issue.

B. Cross-Examination of Dr. Kessler

Defendant contends that the trial court erred in not allowing him to cross-examine Dr. Kessler about the effects of cocaine on a person who consistently abused the drug. Defendant submits that such testimony was relevant to negate the requisite mental state for murder, and that the exclusion of the evidence violated his constitutional right to present a defense.

At trial, defense counsel asked Dr. Kessler, "Are you trained in what the effects drugs have on the body are?" After the State's objection, the trial court found that there had been no testimony thus far about Defendant's condition on the night of the offense, and directed defense counsel to proceed with cross-examination on this issue by way of a hypothetical. Defense counsel then asked:

> Dr. Kessler, the question I'm going to ask you is going to be in the form of a hypothetical question, and that is if an individual consistently smoked crack cocaine over the course of the day, were there other [conclusions] you can draw from that ingestion of cocaine, I guess inhalation of cocaine, about that person's behavior?

The trial court sustained the State's objection to the form of the question, finding that the hypothetical was "too speculative at this point."

During an offer of proof outside the presence of the jury, Dr. Kessler testified that every person reacts differently to the ingestion of cocaine, but, in general, cocaine users are "agitated, combative, argumentative."

Generally, the admission of expert testimony is largely entrusted to the sound discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). The trial court's decision may not be overturned on appeal unless the trial court abused that discretion. *Id*.

Rule 702 of the Tennessee Rules of Evidence provides that:

> [i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Unless the testimony is based on the expert's personal observations, the expert may present an opinion based on facts presented in a hypothetical question. Tenn. R. Evid. 705, Advisory Commission Comments. "It has long been the law in Tennessee that it is not proper for hypothetical questions to assume facts that are not supported by the evidence." *State v. Prentice*, 113 S.W.3d 326, 335 (Tenn. Crim. App. 2001) (citations omitted). This issue "is resolved 'by determining whether the question contained enough facts, supported by evidence, to permit an expert to give a reasonable opinion which is not based on mere speculation or conjecture and which is not misleading to the trier of fact.'" *Id*. (quoting *Pentecost v. Anchor Wire Corp*., 662 S.W.2d 327, 328 (Tenn. 1983)). In addition, an expert's response to a hypothetical question must "substantially assist the trier of fact to understand the evidence or to determine a fact in issue," and, must, of course, satisfy other relevancy requirements. Tenn. R. Evid. 401, 702.

At the time that Dr. Kessler testified, the only indication that Defendant may have ingested cocaine on the day of the killing was presented during Mr. Puckett's equivocal testimony that he could not say "for sure" that Defendant was using drugs that day. The hypothetical question as posed at that point in the trial thus required Dr. Kessler to speculate that Defendant "had consistently smoked cocaine over the course of the day," a fact not supported by the evidence. Thus, we conclude that the trial court did not abuse its discretion in ruling the proffered testimony inadmissible.

Moreover, we conclude that the exclusion of this testimony did not violate Defendant's constitutional right to present a defense. The trial court's ruling did not preclude Defendant from presenting evidence in the form of expert testimony as to the physical and mental effects of cocaine ingestion when the issue was subsequently developed during Ms. Evans' testimony and the presentation of Defendant's taped statement to the police. Defendant acknowledges in his brief that expert testimony could have been presented through the defense's own witness, but defense counsel "strategically chose to use the State's medical examiner to do so on the theory that he would be the most credible and qualified witness available." The trial court authorized funds prior to trial to enable Defendant to engage the services of a psychiatrist for the purpose of examining the adverse effects of Defendant's cocaine use, but the expert witness was not called to testify in Defendant's defense. Regardless of any strategic decisions, based on our review of the record, Defendant was not prevented from presenting a defense. Defendant is not entitled to relief on this issue.

IV. Jury Instructions

A. Intoxication as a Defense

Defendant argues that the trial court erred in failing to instruct the jury on voluntary intoxication. The State points out in its brief, and we concur, that the trial court provided such an instruction, which instruction essentially followed the pattern instruction on voluntary intoxication as a defense. *See* Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim 40.02. Defendant is accordingly not entitled to relief on this issue.

B. Failure to Preserve Evidence

Defendant argues that the trial court erred in refusing to instruct the jury on the State's duty to preserve evidence, and the effect of its failure to do so. *See State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). The issue arose during Dr. Kessler's testimony. Dr. Kessler was no longer employed by the Hamilton County medical examiner's office at the time of trial. Dr. Kessler stated that the chief medical examiner did not allow him access to the file concerning the autopsy performed on the victim. Dr. Kessler's testimony at trial was based on the autopsy report which was introduced into evidence as an exhibit. Dr. Kessler said that he deduced from the autopsy report that certain items had been removed or "sanitized" from the information he was allowed to review in preparation for trial. These items included the list of people who had been present during the autopsy and certain physical evidence gathered from the victim during the autopsy, such as clothing, fingernail clippings and hair samples. Dr. Kessler stated that he did not know what happened to these items.

Based on Dr. Kessler's testimony, Defendant requested in writing that the trial court provide a *Ferguson* instruction to the jury. *See* T.C.A. § 40-18-110. During a hearing out of the presence of the jury, the State informed the trial court that the victim's fingernail clippings and hair samples had not been destroyed or lost but were still in the medical examiner's office. Accordingly, the trial court declined to provide the requested *Ferguson* instruction.

As observed by the supreme court:

> [t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution provides for every defendant the right to a fair trial. To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215, 218 (1963). Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about a defendant's guilt. *United States v. Agurs*, 427 U.S. 97, 110-11, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342, 353-54 (1976).

State v. Ferguson, 2 S.W.3d 912, 915 (Tenn. 1999).

In *Ferguson*, the court examined the consequences flowing from the State's destruction or loss of evidence alleged to be exculpatory. *Id*. The first step in a court's analysis, however, is a determination that the State had the duty to preserve the evidence in question and that the State failed to do so. *Id*. at 917. The State concedes in its brief that it generally has a duty to preserve physical evidence gathered during an autopsy of a criminal victim. The State contends, however, that Defendant has failed to show that the State lost or destroyed the victim's fingernail clippings, or that the evidence was even "missing."

Because he was not an employee of the medical examiner's office when he commenced his preparation for trial, Dr. Kessler was only provided access to a file that had been, in Dr. Kessler's view, "sanitized." Dr. Kessler during his testimony was clearly upset that he was not given complete access to the victim's autopsy file. Dr. Kessler stated that the chief medical examiner had removed the list of technicians who had assisted him with the autopsy, and he was thus unable to call someone and ask about whether any tests had been performed on the victim's hair and fingernails. That is not to say, however, that the victim's fingernail clippings were not available to Defendant upon request. Based on our review, we conclude that Defendant has failed to demonstrate that the State failed to preserve evidence. Accordingly, Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE